No. 92-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BARCLAYS BANK PLC,
Petitioner,

v.

FRANCHISE TAX BOARD,
AN AGENCY OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

---

BRIEF OF THE COUNCIL OF NETHERLANDS INDUSTRIAL FEDERATIONS AS AMICUS CURIAE SUPPORTING PETITIONER

F. EUGENE WIRWAHN
Chestnut Oaks
24130 Deep Hollow Lane
Aldie, Virginia 22001
(703) 327-4871
Counsel for the Council of Netherlands Industrial Federations as Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional under the Foreign Commerce Clause of the United States Constitution.

2. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional where such application imposes discriminatory compliance burdens on such entities.

3. Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, intrudes into an inherently federal area and is preempted by the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1384

BARCLAYS BANK PLC,
Petitioner,
v.
FRANCHISE TAX BOARD,
AN AGENCY OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

---

BRIEF OF THE COUNCIL OF NETHERLANDS INDUSTRIAL FEDERATIONS AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The Council of Netherlands Industrial Federations (Raad van Nederlandse Werkgeversverbonden) (herein "The Council") consists of the Federation of the Netherlands Industry (Verbond van Nederlandse Ondernemingen) and the Netherlands Christian Federation of Employers (Nederlands Christelijk Werkgeversverbond). Both organizations are federations together consisting of 150 trade and employers' associations, representing more than 50,000 enterprises with over 2,000,000 employees, which is two-thirds of the private sector employment in the

Netherlands. Over 400 companies, including a number of public utilities, are also members. In addition, more than 6,000 individual employers and entrepreneurs are personal members. The combined membership, which includes all large and most medium-sized companies in the Netherlands, spans virtually all sections of its economy: manufacturing, building and construction, land, sea and air transport, harbors, banking, insurance, wholesale trade, department and chain stores, publishing and fisheries.

A strong international orientation has long been a characteristic of the Dutch economy. This is reflected in the interests of the federations' members, a number of which have subsidiaries in, or do business in, the United States. The Council is firmly committed to healthy international relations that foster international trade and investment. Likewise, it strongly objects to measures that cause international double taxation or otherwise impede the free development of the world economy.

Like the Dutch Government, the Council has always actively opposed the application of the method of corporate income allocation known as worldwide combined reporting ("WWCR"). As early as 1980, the Council appeared before hearings held by the Committee on Ways and Means of the United States House of Representatives to express its opposition to WWCR as a cause of international double taxation and to explain the more onerous administrative burden that WWCR imposes on foreign based multinational corporations than on such corporate groups based in the United States.[1]

The Council submits this brief *amicus curiae* in support of Petitioner.[2]

---

[1] *Hearings on H.R. 5076 before the House Committee on Ways and Means*, 96th Cong., 2d Sess. (1980), (statement of Joseph H. Guttentag, Counsel, on behalf of the Dutch Employers' Federation).

[2] Petitioner and Respondent have consented to the filing of this brief *amicus curiae* in letters filed with the Clerk of this Court.

ARGUMENT

I. WORLDWIDE COMBINED REPORTING IS INCOMPATIBLE WITH THE INTERNATIONALLY ACCEPTED ARM'S LENGTH SEPARATE ACCOUNTING ("AL/SA") PRINCIPLE AND THEREFORE CAUSES DOUBLE TAXATION.

Over a long period of time the governments of the major economic countries have developed, and then preserved, AL/SA as an effective means of ensuring that corporate income will be taxed only where it arises in an economic sense. Thus, a major impediment of the development of international trade and investment—the double taxation of the income of internationally active multinational corporate groups—can be effectively combatted. The United States Federal Government has played a leading role in the development of AL/SA and has unreservedly endorsed the enshrining of the principle in, for example, the OECD Model Taxation Convention and the official Commentary thereon.[3]

WWCR, as applied by Respondent Franchise Tax Board of California, is incompatible with the internationally accepted and internationally applied AL/SA. WWCR conflicts with the United States' use of AL/SA in all its double taxation treaties and causes double taxation.

Inherent in Respondent's application of WWCR is the deliberate refusal to accord significance to the presence or absence of any economic connection between the income it seeks to tax and the State of California. It is assumed that three arbitrary factors, property, payroll, and sales, provide a justifiable basis for determining by pro rata allocation the taxable income to be subject to the various

---

[3] Report of the OECD Comm. on Fiscal Affairs, Model Double Taxation Convention on Income and on Capital, arts. 5(7), 7(2), 9(1) (1977).

taxing jurisdictions with which such income is economically connected. That assumption ignores the economic diversity of the activities giving rise to the income and disregards the differing economic climates in which the income was earned. Unless the application or WWRC is limited to a reasonable homogenous economy, such as found in the United States, the assumption is necessarily false and conflicts with the application by other taxing authorities of the more objective and realistic AL/SA. Double taxation of the same income in a significant number of cases is unavoidable with WWCR, thus seriously impeding international trade and investment.

II. THE APPLICATION OF WORLDWIDE COMBINED REPORTING BY A STATE CAUSES THE UNITED STATES TO DEFAULT ON ITS INTERNATIONAL OBLIGATIONS.

On August 18, 1983 Minister of Finance for the Netherlands H. O. Ruding wrote to United States Secretary of the Treasury Donald T. Regan:

> For the Netherlands Government the issue of unitary taxation has been of great concern for a considerable period of time as you may be aware. During the negotiations on the revision of the double taxation convention between our countries it has repeatedly been stressed that it is an anomaly to discuss the matter of avoidance of double taxation when—as a result of the unitary method—double taxation remains an inevitable consequence of operating a business within the territory of the convention.

The decision of the California Supreme Court would deny the precedence of the United States Federal Government's international tax policy over California's tax policy. Without such precedence, the United States cannot deliver on its international commitments to prevent taxation of income not reasonably allocable to its jurisdiction and to ensure fair and reasonable treatment of its treaty partners' corporations. These commitments arise

from all the treaties for the avoidance of double taxation and from the many treaties of friendship, commerce, and navigation ("FCN") to which the United States is a party. The Council notes that the Netherlands and the United States have both a double taxation treaty and a FCN treaty in force.[4]

If the United States Federal Government cannot effectuate its treaty obligations, its ability to negotiate such treaties will be seriously impaired. This impairment cannot but jeopardize the chances of the United States and its potential treaty partners to achieve optimum progress toward their common goal—the removal, or at least mitigation, of the many impediments to international trade and investment.

III. THE APPLICATION OF WORLDWIDE COMBINED REPORTING LEADS TO UNACCEPTABLE COMPLIANCE BURDENS ON FOREIGN BASED MULTINATIONAL CORPORATE GROUPS.

With all its double taxation treaties the United States protects corporations of its treaty partners and their subsidiaries against more burdensome taxes and compliance difficulties than affect their American counterparts. The United States also affords fair and reasonable treatment under its FCN treaties. For example, a foreign based multinational corporation will not ordinarily have to restate its accounts in accordance with the accounting principles of the United States or one of its states, nor need to translate its accounts into U.S. dollars or all its records

---

[4] The Convention between the United States of America and the Kingdom of the Netherlands with Respect to Taxes on Income and Certain Other Taxes, signed at Washington, April 29, 1948, 6 U.S.T. 3696, T.I.A.S. No. 1855, as amended by the Supplementary Convention, signed at Washington, December 30, 1965, 17 U.S.T. 896, T.I.A.S. No. 6051; The Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, signed at the Hague, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 1855.

in English. WWCR requires such restatement and translation, thereby putting a disproportionate compliance burden on foreign based multinational corporate groups. The decision of the California Supreme Court below would allow discrimination against foreign corporations and the conflict with the commitments of the United States towards fairness to persist.

IV. RECENT CALIFORNIA LEGISLATION DOES NOT PREVENT THE REINTRODUCTION OF WORLDWIDE COMBINED REPORTING.

It cannot be argued that recent California legislation has reduced the need for this Court to establish the unconstitutionality of WWCR. If the decision of the California Supreme Court below is upheld, nothing will prevent California, or any other state, from introducing (again) WWCR whenever they judge it to be in their best interest. This threat is in itself an impediment to international trade and investment. Unless this Court reverses the decision of the California Supreme Court the exposure of foreign based multinational corporations to treatment conflicting with the international commitments of the United States will continue.

CONCLUSION

For these reasons, the Council of Netherlands Industrial Federations respectfully asks this Court to reverse the decision of the California Supreme Court, thereby upholding the decision of the Court of Appeal of the State of California in and for the Third Appellate District as to the unconstitutionality of Respondent's use of WWCR under the Foreign Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.

Respectfully submitted,

F. EUGENE WIRWAHN
Chestnut Oaks
24130 Deep Hollow Lane
Aldie, Virginia 22001
(703) 327-4871
Counsel for the Council of Netherlands Industrial Federations as Amicus Curiae

Dated December 15, 1993.